

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

DEBRA M. POLLIC,

Plaintiff,

Case No. 3:19-cv-28

vs.

COMMISSIONER OF SOCIAL SECURITY,

District Judge Walter H. Rice
Magistrate Judge Michael J. Newman

Defendant.

**REPORT AND RECOMMENDATION¹ THAT: (1) THE ALJ'S NON-DISABILITY
FINDING BE FOUND UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND
REVERSED; (2) THIS MATTER BE REMANDED TO THE COMMISSIONER UNDER
THE FOURTH SENTENCE OF 42 U.S.C. § 405(g) FOR FURTHER PROCEEDINGS;
AND (3) THIS CASE BE CLOSED**

This is a Social Security disability benefits appeal. At issue is whether the Administrative Law Judge (“ALJ”) erred in finding Plaintiff not “disabled” and therefore unentitled to Disability Insurance Benefits (“DIB”). This case is before the Court on Plaintiff’s Statement of Errors (doc. 8), the Commissioner’s memorandum in opposition (doc. 11), the administrative record (doc. 4),² and the record as a whole.

I.

A. Procedural History

Plaintiff filed for DIB alleging a disability onset date of July 22, 2011. PageID 39. Plaintiff claims disability as a result of a number of alleged impairments including, *inter alia*, Sjögren’s

¹ Attached hereto is a NOTICE to the parties regarding objections to this Report and Recommendation.

² Hereafter, citations to the electronically-filed administrative record will refer only to the PageID number.

syndrome,³ fibromyalgia, rheumatoid arthritis, osteoarthritis, mild scoliosis, mild peripheral neuropathy, Raynaud's disease, depression, and a panic disorder. PageID 41.

After an initial denial of her application, Plaintiff received a hearing before ALJ Mark Hockensmith on April 23, 2018. PageID 123-50. The ALJ issued a written decision on July 3, 2018 finding Plaintiff not disabled. PageID 39-56. Specifically, the ALJ found at Step Five that, based upon Plaintiff's residual functional capacity ("RFC") to perform a limited range of light work,⁴ "there are jobs that exist in significant numbers in the national economy that [Plaintiff] can perform[.]" PageID 43-56.

Thereafter, the Appeals Council denied Plaintiff's request for review, making the ALJ's non-disability finding the final administrative decision of the Commissioner. PageID 25-30; *see Casey v. Sec'y of Health & Human Servs.*, 987 F.2d 1230, 1233 (6th Cir. 1993). Plaintiff then filed this timely appeal. *Cook v. Comm'r of Soc. Sec.*, 480 F.3d 432, 435 (6th Cir. 2007).

B. Evidence of Record

The evidence of record is adequately summarized in the ALJ's decision (PageID 39-56), Plaintiff's Statement of Errors (PageID 1192-1202), and the Commissioner's memorandum in opposition (PageID 1207-15). The undersigned incorporates all of the foregoing and sets forth the facts relevant to this appeal herein.

³ "Sjögren's syndrome is a chronic autoimmune disease in which a person's white blood cells attack their moisture-producing glands...[a]bout half of the time Sjögren's occurs alone, and the other half it occurs in the presence of another autoimmune connective tissue disease such as rheumatoid arthritis, lupus, or scleroderma." *Bailey v. Comm'r of Soc. Sec.*, No. CIV-13-945-R, 2015 WL 500509, at *1 n.1 (W.D. Okla. Feb. 4, 2015).

⁴ Light work "involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds" and "requires a good deal of walking or standing, or...sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b). An individual who can perform light work is presumed also able to perform sedentary work. *Id.* Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties." 20 C.F.R. § 404.1567(a).

II.

A. Standard of Review

The Court's inquiry on a Social Security appeal is to determine (1) whether the ALJ's non-disability finding is supported by substantial evidence, and (2) whether the ALJ employed the correct legal criteria. 42 U.S.C. § 405(g); *Bowen v. Comm'r of Soc. Sec.*, 478 F.3d 742, 745-46 (6th Cir. 2007). In performing this review, the Court must consider the record as a whole. *Hephner v. Mathews*, 574 F.2d 359, 362 (6th Cir. 1978).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When substantial evidence supports the ALJ's denial of benefits, that finding must be affirmed, even if substantial evidence also exists in the record upon which the ALJ could have found Plaintiff disabled. *Buxton v. Halter*, 246 F.3d 762, 772 (6th Cir. 2001). Thus, the ALJ has a "‘zone of choice’ within which he [or she] can act without the fear of court interference." *Id.* at 773.

The second judicial inquiry -- reviewing the correctness of the ALJ's legal analysis -- may result in reversal even if the ALJ's decision is supported by substantial evidence in the record. *Rabbers v. Comm'r of Soc. Sec.*, 582 F.3d 647, 651 (6th Cir. 2009). "[A] decision of the Commissioner will not be upheld where the [Social Security Administration] fails to follow its own regulations and where that error prejudices a claimant on the merits or deprives the claimant of a substantial right." *Bowen*, 478 F.3d at 746.

B. "Disability" Defined

To be eligible for disability benefits, a claimant must be under a "disability" as defined by the Social Security Act. 42 U.S.C. § 423(d)(1)(A). Narrowed to its statutory meaning, a "disability" includes physical and/or mental impairments that are both "medically determinable"

and severe enough to prevent a claimant from (1) performing his or her past job and (2) engaging in “substantial gainful activity” that is available in the regional or national economies. *Id.*

Administrative regulations require a five-step sequential evaluation for disability determinations. 20 C.F.R. § 404.1520(a)(4). Although a dispositive finding at any step ends the ALJ’s review, *see Colvin v. Barnhart*, 475 F.3d 727, 730 (6th Cir. 2007), the complete sequential review poses five questions:

1. Has the claimant engaged in substantial gainful activity?;
2. Does the claimant suffer from one or more severe impairments?;
3. Do the claimant’s severe impairments, alone or in combination, meet or equal the criteria of an impairment set forth in the Commissioner’s Listing of Impairments (the “Listings”), 20 C.F.R. Subpart P, Appendix 1?;
4. Considering the claimant’s RFC, can he or she perform his or her past relevant work?; and
5. Assuming the claimant can no longer perform his or her past relevant work -- and also considering the claimant’s age, education, past work experience, and RFC -- do significant numbers of other jobs exist in the national economy which the claimant can perform?

20 C.F.R. § 404.1520(a)(4); *see also Miller v. Comm’r of Soc. Sec.*, 181 F. Supp.2d 816, 818 (S.D. Ohio 2001). A claimant bears the ultimate burden of establishing disability under the Social Security Act’s definition. *Key v. Comm’r of Soc. Sec.*, 109 F.3d 270, 274 (6th Cir. 1997).

III.

In her Statement of Errors, Plaintiff argues that the ALJ erred in: (1) failing to apply the Borderline Age Policy;⁵ (2) evaluating the medical source opinions of record (particularly, medical

⁵ “If [an individual is] within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that [the individual is] disabled, [the ALJ] will consider whether to use the older age category after evaluating the overall impact of all the factors of [the individual’s] case.” 20 C.F.R. § 404.1563(b). ALJs are not permitted to apply the age categories mechanically and are instead required “to consider whether use of an older age category would be appropriate in a borderline case.” *Bowie v. Comm’r of Soc. Sec.*, 539 F.3d 395, 399 (6th Cir. 2008).

records by her treating physicians Jon Ryan, D.O., Candice Flaughers, D.O., Jerome Leahey M.D., Michael Valle, D.O., and Lita Mathal, M.D.); and (3) determining her RFC. PageID 1192-1202. Finding error in the ALJ's weighing of the opinions of Drs. Ryan, Flaughers, Leahey, Valle, and Mathal, the Court does not address Plaintiff's other alleged errors and, instead, directs that those issues be addressed by the ALJ on remand.

Until March 27, 2017, "the Commissioner's regulations [that apply to this appeal] establish[ed] a hierarchy of acceptable medical source opinions[.]" *Snell v. Comm'r of Soc. Sec.*, No. 3:12-cv-119, 2013 WL 372032, at *9 (S.D. Ohio Jan. 30, 2013). In descending order, these medical source opinions are: (1) treaters; (2) examiners; and (3) record reviewers. *Id.* Under the regulations then in effect, the opinions of treaters are entitled to the greatest deference because they "are likely to be . . . most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations[.]" 20 C.F.R. § 404.1527(c)(2).

A treater's opinion must be given "controlling weight" if "well-supported by medically acceptable clinical and laboratory diagnostic techniques and . . . not inconsistent with the other substantial evidence in [the] case record." *LaRiccia v. Comm'r of Soc. Sec.*, 549 F. App'x 377, 384 (6th Cir. 2013). Even if a treater's opinion is not entitled to controlling weight, "the ALJ must still determine how much weight is appropriate by considering a number of factors, including the length of the treatment relationship and the frequency of examination, the nature and extent of the treatment relationship, supportability of the opinion, consistency of the opinion with the record as a whole, and any specialization of the treating physician." *Blakley v. Comm'r of Soc. Sec.*, 581

However, ALJs are not required "to address a claimant's borderline age situation in [the ALJ's] opinion or explain [the ALJ's] thought process in arriving at a particular age-category determination." *Id.*

F.3d 399, 406 (6th Cir. 2009); *see also* 20 C.F.R. § 404.1527(c)/20 C.F.R. §404.1527(c).⁶

After treaters, “[n]ext in the hierarchy are examining physicians and psychologists, who often see and examine claimants only once.” *Snell*, 2013 WL 372032, at *9.

Record reviewers are afforded the least deference and these “non-examining physicians’ opinions are on the lowest rung of the hierarchy of medical source opinions.” *Id.* Put simply, “[t]he regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual [claimant] become weaker.” *Id.* (citing SSR 96-6p, 1996 WL 374180, at *2 (July 2, 1996)). In the absence of a controlling treating source opinion, an ALJ must “evaluate all medical opinions” with regard to the factors set forth in 20 C.F.R. § 404.1527(c), *i.e.*, length of treatment history; consistency of the opinion with other evidence; supportability; and specialty or expertise in the medical field related to the individual’s impairment(s). *Walton v. Comm’r of Soc. Sec.*, No. 97-2030, 1999 WL 506979, at *2 (6th Cir. June 7, 1999).

The issue of treating physicians, and the appropriate deference due to a treater by an ALJ, is a matter this Court has addressed on many recent occasions. To that end, the undersigned has repeatedly recommended for, or ordered, the reversal of ALJ findings under Sentence Four when the treating physician rule was not followed by the ALJ. *See, e.g., Bowermaster v. Commissioner of Soc. Sec.*, 395 F. Supp. 3d 955, 961-63 (S.D. Ohio 2019); *Roden v. Commissioner of Soc. Sec.*, 389 F. Supp. 3d 548, 553-56 (S.D. Ohio 2019); *Paloncy v. Commissioner of Soc. Sec.*, No. 3:18-cv-298, 2019 WL 4315779, at *4-6 (S.D. Ohio Sept. 12, 2019); *Miller v. Commissioner of Soc.*

⁶ In essence, “opinions of a treating source . . . must be analyzed under a two-step process, with care being taken not to conflate the steps.” *Cadle v. Comm’r of Soc. Sec.*, No. 5:12-cv-3071, 2013 WL 5173127, at *5 (N.D. Ohio Sept. 12, 2013). Initially, “the opinion must be examined to determine if it is entitled to controlling weight” and “[o]nly if . . . the ALJ does not give controlling weight to the treating physician’s opinion is the opinion subjected to another analysis based on the particulars of’ 20 C.F.R. § 404.1527. *Id.*

Sec., No. 3:18-cv-281, 2019 WL 4253867, at *4-6 (S.D. Ohio Sept. 9, 2019); *Baker v. Commissioner of Soc. Sec.*, No. 3:18-cv-269, 2019 WL 4199749, at *4-5 (S.D. Ohio Sept. 5, 2019); *Massie v. Commissioner of Soc. Sec.*, No. 3:18-cv-190, 2019 WL 4071719, at *4-6 (S.D. Ohio Aug. 29, 2019); *Hale v. Commissioner of Soc. Sec.*, No. 3:18-cv-238, 2019 WL 3561778, at *5-7 (S.D. Ohio Aug. 6, 2019).

Such is the case here. In this instance, the ALJ erred by failing to specifically mention the applicable concept of controlling weight, analyze the controlling weight factors, or discuss the § 404.1527(c) factors. *See* Page ID 43-54. As the undersigned has repeatedly noted, such a failure is reversible error because it “deprives the Court of the opportunity to meaningfully review whether [the ALJ] undertook the ‘two-step inquiry’ required when analyzing treating source opinions.” *Marks v. Colvin*, 201 F. Supp. 3d 870, 882 (S.D. Ohio 2016). *See also* note 4 *supra*; *Hatton v. Comm’r of Soc. Sec.*, No. 3:18-CV-008, 2018 WL 4766963, at *4 (S.D. Ohio Oct. 3, 2018), report and recommendation adopted, No. 3:18-CV-008, 2018 WL 5084758 (S.D. Ohio Oct. 18, 2018); *Reese v. Comm’r of Soc. Sec.*, No. 3:17-CV-283, 2018 WL 2381896, at *3 (S.D. Ohio May 25, 2018).

In light of all the foregoing, the undersigned finds the ALJ’s non-disability finding unsupported by substantial evidence and meriting reversal.

IV.

When, as here, the ALJ’s non-disability determination is unsupported by substantial evidence, the Court must determine whether to reverse and remand the matter for rehearing or to reverse and order an award of benefits. The Court has authority to affirm, modify or reverse the Commissioner’s decision “with or without remanding the cause for rehearing.” 42 U.S.C. § 405(g); *Melkonyan v. Sullivan*, 501 U.S. 89, 100 (1991). Generally, benefits may be awarded immediately “only if all essential factual issues have been resolved and the record adequately

establishes a plaintiff's entitlement to benefits." *Faucher v. Sec'y of Health & Human Servs.*, 17 F.3d 171, 176 (6th Cir. 1994); *see also Abbott v. Sullivan*, 905 F.2d 918, 927 (6th Cir. 1990); *Varley v. Sec'y of Health & Human Servs.*, 820 F.2d 777, 782 (6th Cir. 1987). In this instance, evidence of disability is not overwhelming, and a remand for further proceedings is necessary.

V.

IT IS THEREFORE RECOMMENDED THAT: (1) the Commissioner's non-disability finding be found unsupported by substantial evidence and **REVERSED**; (2) this matter be **REMANDED** to the Commissioner under the Fourth Sentence of 42 U.S.C. § 405(g) for further proceedings; and (3) this case be **CLOSED**.

Date: 1/31/2020

/s/Michael J. Newman
Michael J. Newman
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within **FOURTEEN** days after being served with this Report and Recommendation. This period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d). Parties may seek an extension of the deadline to file objections by filing a motion for extension, which the Court may grant upon a showing of good cause.

Any objections filed shall specify the portions of the Report and Recommendation objected to, and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based, in whole or in part, upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs.

A party may respond to another party's objections within **FOURTEEN** days after being served with a copy thereof. As noted above, this period is not extended by virtue of Fed. R. Civ. P. 6(d) if served on you by electronic means, such as via the Court's CM/ECF filing system. If, however, this Report and Recommendation was served upon you by mail, this deadline is extended to **SEVENTEEN DAYS** by application of Fed. R. Civ. P. 6(d).

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140, 153-55 (1985); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981).